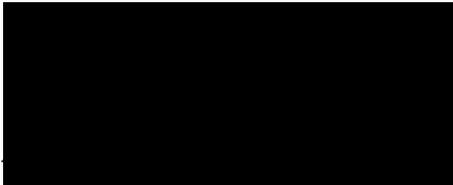




U.S. Citizenship
and Immigration
Services

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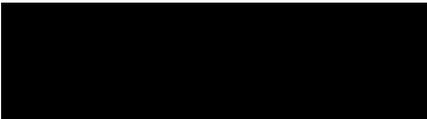
Office: VERMONT SERVICE CENTER

Date: AUG 30 2005

IN RE: Petitioner: [REDACTED]
Beneficiary: [REDACTED]

PETITION: Immigrant petition for Alien Worker as a Skilled Worker or Professional pursuant to section 203(b)(3) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(3)

ON BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision of the Administrative Appeals Office in your case. All documents have been returned to the office that originally decided your case. Any further inquiry must be made to that office.

Robert P. Wiemann, Director
Administrative Appeals Office

DISCUSSION: The preference visa petition was denied by the Director, Vermont Service Center, and is now before the Administrative Appeals Office (AAO) on appeal. The appeal will be dismissed.

The petitioner is an Indian restaurant.¹ It seeks to employ the beneficiary permanently in the United States as a cook (Indian specialty). As required by statute, the petition is accompanied by a Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor. The director determined that the petitioner had not established that it had the continuing ability to pay the beneficiary the proffered wage beginning on the priority date of the visa petition. The director denied the petition accordingly.

On appeal, the counsel submits a brief and additional evidence.

Section 203(b)(3)(A)(i) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(3)(A)(i), provides for the granting of preference classification to qualified immigrants who are capable, at the time of petitioning for classification under this paragraph, of performing skilled labor (requiring at least two years training or experience), not of a temporary nature, for which qualified workers are not available in the United States.

The regulation 8 C.F.R. § 204.5(g)(2) states in pertinent part:

Ability of prospective employer to pay wage. Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be in the form of copies of annual reports, federal tax returns, or audited financial statements.

The petitioner must demonstrate the continuing ability to pay the proffered wage beginning on the priority date, which is the date the Form ETA 750 Application for Alien Employment Certification, was accepted for processing by any office within the employment system of the U.S. Department of Labor. The petitioner must also demonstrate that, on the priority date, the beneficiary had the qualifications stated on its Form ETA 750 Application for Alien Employment Certification as certified by the U.S. Department of Labor and submitted with the instant petition. *Matter of Wing's Tea House*, 16 I&N Dec. 158 (Act. Reg. Comm. 1977).

Here, the Form ETA 750 was accepted on April 2, 2001. The proffered wage as stated on the Form ETA 750 is \$11.46 per hour (\$23,836.80). The Form ETA 750 states that the position requires two years experience.

With the petition, counsel submitted the following documents: the original Form ETA 750, Application for Alien Employment Certification, approved by the Department of Labor, copies of documentation concerning the beneficiary's qualifications as well as other documents.

Because the Director determined the evidence submitted was insufficient to demonstrate the petitioner's continuing ability to pay the proffered wage beginning on the priority date and insufficient to show that the

¹ The business changed ownership on September 26, 2001. The petitioner is the current business owner.

beneficiary had the requisite two years work experience, the Vermont Service Center on September 16, 2003 requested evidence pertinent to that issue.

Consistent with 8 C.F.R. § 204.5(g)(2), the Service Center requested pertinent evidence of the petitioner's ability to pay the proffered wage beginning on the priority date. The Service Center specifically requested:

Submit additional evidence to establish that the employer had the ability to pay the proffered wage or salary of \$11.46 per hour (\$23,836.80 per year) as of April 2, 2001, the date of filing and continuing to the present.

* * *

Submit the 2001 and 2002 United States federal income tax return(s), with all schedules and attachments for your business.

If your business reports income for tax purposes based on a fiscal year, submit the appropriate evidence that relates to the date of filing, April 2, 2001.

If the beneficiary was employed by you in 2001 and 2002, submit copies of the beneficiary's Form W-2 Wage and Tax Statement(s) showing how much the beneficiary was paid by your business."

In response to the Request for Evidence of the petitioner's ability to pay the proffered wage beginning on the priority date, counsel submitted the prior business owner's Internal Revenue Service (IRS) Form 1120S tax returns for year 2001, the petitioner's Form 1120S for 2001, the beneficiary's W-2 wage and Tax Statement for 2003, and pay stubs for three months of 2004 and other documents including complied financial statements.²

The director denied the petition on March 25, 2004, finding that the evidence submitted did not establish that the petitioner had the continuing ability to pay the proffered wage beginning on the priority date.

On appeal, counsel contends that because the petitioner is now paying the beneficiary an wage that equates on a yearly basis more than the proffered wage, "It is reasonable to conclude that the employer currently has sufficient funds to pay the prevailing wage and will have sufficient funds when the beneficiary obtains his permanent status."

As petitioner is the successor to the prior business in that location, the petitioner must show the ability to pay the proffered wage from the date of ownership change. The petitioner is also responsible to provide evidence of the prior owner's ability to pay the proffered wage from the priority date of the certified Alien Employment Certification.

In determining the petitioner's ability to pay the proffered wage during a given period, U.S. Citizenship and Immigration Services (CIS) will first examine whether the petitioner employed and paid the beneficiary during that period. If the petitioner establishes by documentary evidence that it employed the beneficiary at a salary equal to or greater than the proffered wage, the evidence will be considered *prima facie* proof of the petitioner's ability to pay the proffered wage. The petitioner employed the beneficiary from February 2003.

² A compilation is limited to presenting in the form of financial statements, information that is the representation of management.

The beneficiary's W-2 Wage and Tax Statement for 2003 stated wages of \$23,400.00. Pay statements submitted for 2004 show a monthly salary of \$1,800.00 that equals \$21,600.00 on a yearly basis. As the proffered wage is \$23,836.80, the petitioner has not paid the beneficiary the proffered wage since he entered petitioner's employment.

Alternatively, in determining the petitioner's ability to pay the proffered wage, CIS will examine the net income figure reflected on the petitioner's federal income tax return, without consideration of depreciation or other expenses. Reliance on federal income tax returns as a basis for determining a petitioner's ability to pay the proffered wage is well established by judicial precedent. *Elatos Restaurant Corp. v. Sava*, 632 F.Supp. 1049, 1054 (S.D.N.Y. 1986) (citing *Tongatapu Woodcraft Hawaii, Ltd. v. Feldman*, 736 F.2d 1305, (9th Cir. 1984)); see also *Chi-Feng Chang v. Thornburgh*, 719 F.Supp. 532 (N.D. Texas 1989); *K.C.P. Food Co., Inc. v. Sava*, 623 F.Supp. 1080 (S.D.N.Y. 1985); *Ubeda v. Palmer*, 539 F.Supp. 647 (N.D. Ill. 1982), aff'd, 703 F.2d 571 (7th Cir. 1983). In *K.C.P. Food Co., Inc. v. Sava*, the court held that the Service had properly relied on the petitioner's net income figure, as stated on the petitioner's corporate income tax returns, rather than the petitioner's gross income. *Supra* at 1084. The court specifically rejected the argument that the INS, now CIS, should have considered income before expenses were paid rather than net income. Finally, no precedent exists that would allow the petitioner to "add back to net cash the depreciation expense charged for the year." *Chi-Feng Chang v. Thornburgh, Supra* at 537. See also *Elatos Restaurant Corp. v. Sava, Supra* at 1054.

The tax returns demonstrated the following financial information concerning the petitioner's ability to pay the proffered wage of \$23,836.80 per year from the priority date.

- In 2003, the Form 1120S stated taxable income³ of \$5,061.00.
- In 2002, the Form 1120-A stated taxable income loss⁴ of <\$16,751.00>⁵.
- In 2001, the Form 1120S stated taxable income loss of <\$26,982.00>⁶.
- In 2001, the Form 1120-A stated taxable income loss of <\$334.00>.

At no time did the petitioner or prior owner have sufficient income to pay the proffered wage in 2001 through 2003 by taxable income alone.

If the net income the petitioner demonstrates it had available during that period, if any, added to the wages paid to the beneficiary during the period, if any, do not equal the amount of the proffered wage or more, CIS will review the petitioner's assets. In 2003, the Form 1120S stated taxable income of \$5,061.00. The beneficiary's W-2 Wage and Tax Statement for 2003 stated wages of \$23,400.00. In 2003, the petitioner could pay the proffered wage.

The petitioner's net current assets can be considered in the determination of the ability to pay the proffered wage especially when there is failure of the petitioner to demonstrate it has taxable income to pay the proffered wage. In the subject case, as set forth above, petitioner did not have taxable income to sufficient pay the proffered wage at any time between the years 2001 through 2002 for which petitioner's tax returns are offered for evidence.

³ IRS Form 1120S, Line 21.

⁴ IRS Form 1120-A, Line 24

⁵ The symbols <a number> indicate a negative number, or in the context of a tax return or other financial statement, a loss, that is below zero.

⁶ Prior owner's return.

CIS will consider *net current assets* as an alternative method of demonstrating the ability to pay the proffered wage. Net current assets are the difference between the petitioner's current assets and current liabilities.⁷ A corporation's year-end current assets are shown on Schedule L, lines 1 through 6. That schedule is included with, as in this instance, the petitioner's filing of Form 1120S federal tax return. The petitioner's year-end current liabilities are shown on lines 16 through 18. (On IRS Form 1120-A, the petitioner's year-end current liabilities are shown on Part III.) If a corporation's end-of-year net current assets are equal to or greater than the proffered wage, the petitioner is expected to be able to pay the proffered wage.

Examining the two Form⁸ 1120S U.S. Income Tax Returns submitted by petitioner, Schedule L found in each of those returns indicates the following.

- In 2003, petitioner's Form 1120S return stated current assets of \$18,667.00 and \$3,549.00 in current liabilities. Therefore, the petitioner had \$15,118.00 in net current assets for 2003. Since the proffered wage was \$23,836.80 per year, this sum is less than the proffered wage.
- In 2001, prior owner's Form 1120S return stated current assets of \$23,437.00 and \$12,498.00 in current liabilities. Therefore, the petitioner had a \$10,939.00 in net current assets for 2001. Since the proffered wage was \$23,836.80 per year, this sum is less than the proffered wage.

The petitioner's 2001 net current assets show that it had the ability to pay from the date in 2001 in which it acquired the business, but the prior owner's return shows \$10,939.00 in net current assets from the priority date until the business sale and assumption of its obligations under the employment certification. This amount does not show the prior owner had sufficient net current assets available to pay the proffered wage during that period. Therefore, for the years 2001 and 2003⁹ from the date the Form ETA 750 was accepted for processing by the U. S. Department of Labor, the petitioner or its successor had not established that they had the ability to pay the beneficiary the proffered wage at the time of filing through an examination of its current assets.

The unaudited Profit and Loss statements that petitioner submitted are not persuasive evidence. According to the plain language of 8 C.F.R. § 204.5(g)(2), where the petitioner relies on financial statements as evidence of a petitioner's financial condition and ability to pay the proffered wage, those statements must be audited. Unaudited statements are the unsupported representations of management. The unsupported representations of management are not persuasive evidence of a petitioner's ability to pay the proffered wage. Thus, the unaudited Profit and Loss statements are of little evidentiary value in this matter.

⁷ According to *Barron's Dictionary of Accounting Terms* 117 (3rd ed. 2000), "current assets" consist of items having (in most cases) a life of one year or less, such as cash, marketable securities, inventory and prepaid expenses. "Current liabilities" are obligations payable (in most cases) within one year, such as accounts payable, short-term notes payable, and accrued expenses (such as taxes and salaries). *Id.* at 118.

⁸ One of the tax returns for 2002, Form 1120-A, was submitted with a blank Part III, and it is not represented here.

⁹ Petitioner also submitted two Form 1120-A U.S. Income Tax Returns. In tax year 2002, petitioner's Form 1120-A, Part III contained no entries. In 2001, petitioner's Form 1120-A return stated current assets of \$39,474.00 and \$0.00 in current liabilities.

The evidence presented in three corporate tax returns as submitted by petitioner do not show its ability to pay the proffered wage from the day the Form ETA 750 was accepted for processing by any office within the employment system of the Department of Labor.

The burden of proof in these proceedings rests solely with the petitioner. Section 291 of the Act, 8 U.S.C. § 1361. The petitioner has not met that burden.

ORDER: The appeal is dismissed.